

**United States Department of Labor
Employees' Compensation Appeals Board**

L.V., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
JAMES A. HALEY VA MEDICAL CENTER,
Tampa, FL, Employer**

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**Docket No. 19-1725
Issued: April 5, 2021**

Appearances:

*Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 14, 2019 appellant, through counsel, filed a timely appeal from a February 15, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The Board notes that following the February 15, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of total disability commencing June 6, 2016 causally related to his accepted employment conditions.

FACTUAL HISTORY

On August 12, 2015 appellant, then a 57-year-old registered nurse, filed an occupational disease claim (Form CA-2), alleging that he developed bilateral upper and lower extremity radiculitis due to factors of his federal employment, including caring for and turning patients. He indicated that he first became aware of his condition on July 28, 2015. On the reverse side of the claim form, a supervisor for the employing establishment indicated that appellant did not stop work and there were no modifications of work assignments at the time that he filed his claim. On November 18, 2015 OWCP accepted appellant's claim for cervical disc displacement and dorsopathies C3-4, C4-5, and C5-6; impingement syndrome of the right shoulder; and lumbar intervertebral disc disorders with myelopathy at L3-4, L4-5, and L5-S1.

On February 18 2016 an employing establishment human resources specialist notified OWCP that appellant had been performing a light-duty assignment since September 2015 and requested a second opinion evaluation to determine his work capacity.

In March 7 and 24, 2016 reports, appellant's attending physician, Dr. Sara Vizcay, a Board-certified family practitioner, opined that appellant could perform sedentary work four hours a day, three days per week. She attributed this partial disability to his accepted employment injuries. Dr. Vizcay completed a similar report on April 7, 2016.

On March 30, 2016 appellant accepted a light-duty position beginning April 14, 2016 working four hours a day, three days per week.

On June 6, 2016 Dr. James A. Haley, a Board-certified family practitioner, completed a work capacity evaluation (Form OWCP-5c) indicating that appellant was totally disabled due to lumbar and cervical stenosis.

Beginning on June 9, 2016 appellant filed claims for compensation (Form CA-7) requesting wage-loss compensation for disability for the period beginning June 6, 2016.

In a June 21, 2016 development letter, OWCP advised appellant that the evidence of record was insufficient to establish his claim for a recurrence of disability. It provided him with the definition of a recurrence of disability and requested additional factual and medical evidence supporting his claimed recurrence of total disability beginning June 6, 2016. OWCP provided appellant with a questionnaire for his completion. It afforded him 30 days to respond.

³ 5 U.S.C. § 8101 *et seq.*

On August 1, 2016 appellant completed the development questionnaire and provided additional medical evidence. He described his light-duty positions. Appellant asserted that his spinal stenosis caused numbness in his upper and lower extremities as well as radicular pain. He noted that beginning in January 2016 he worked four hours every other day as he could neither stand nor sit comfortably for prolonged periods. Appellant also alleged that his medications caused impairment. He indicated that he was diagnosed with degenerative disc disease in 1992 and that performing tasks including pulling, pushing, turning, lifting, and stooping as a registered nurse had seriously aggravated this underlying condition. Appellant asserted that he experienced continuous pain, stiffness, numbness and weakness in his neck, arms, and legs. He denied any other injuries or outside work that contributed to his symptoms.

On May 9, 2016 Dr. Bharatkumar Patel, a Board-certified neurologist, examined appellant and found normal strength and sensation through his upper and lower extremities. He noted that appellant had 1+ reflexes in both upper and lower extremities. Dr. Patel reviewed appellant's cervical and lumbar magnetic resonance imaging (MRI) scans. He diagnosed cervical disc disease with neuritis and bilateral upper extremity radiculopathy since the work-related injury in 2009 with multilevel degenerative disc herniations on MRI scan. Dr. Patel also diagnosed lumbar disc syndrome with neuritis and bilateral lower extremity radiculopathy since 1992 aggravated by work-related injury in 2009. He recommended that appellant retire as his condition was not going to improve, but would instead worsen with time. Dr. Patel restricted appellant's bending, pushing, pulling, twisting, and stooping. He also restricted appellant's lifting or carrying to no more than 10 to 15 pounds. Dr. Patel found that appellant would avoid working overhead, and prolonged hyperextension or hyperflexion. He recounted that appellant's lumbar pain worsened with prolonged sitting and noted that the medication prescribed for this condition could cause drowsiness resulting in difficulty concentrating.

May 20, 2016 electromyogram and nerve conduction velocity (EMG/NCV) studies demonstrated mild right carpal tunnel syndrome, and mild right ulnar neuropathy at the elbow.

On June 6, 2016 Dr. Vizcay examined appellant and opined that he was no longer capable of light-duty work due to daily exacerbation of his bilateral upper and lower extremity neuropathies. She found that he had trouble sitting, standing, and lifting. Dr. Vizcay noted that appellant had an antalgic gait with a head tilt to the right. She found that appellant required medications that caused sedation and decreased concentration. Dr. Vizcay recommended ergonomic accommodations and disability retirement.

By decision dated August 22, 2016, OWCP denied appellant's claim for recurrence of disability finding that he had not established that he was disabled due to a material change of his accepted cervical, lumbar, and right shoulder conditions.

Dr. Vizcay examined appellant on June 28, 2016 due to cervical and lumbar spine muscle spasms and radiculitis into his bilateral upper extremities. She further noted that his lumbar condition was chronic and expected to progress because of myelopathy.

Appellant underwent additional EMG/NCV studies on July 15, 2016 which demonstrated bilateral chronic L3-4 radiculopathy.

On August 23, 2016 Dr. Vizcay completed a work capacity evaluation (Form OWCP-5c) and found that appellant could sit, walk, stand, and reach intermittently for 30 minutes per hour. She also indicated that he could not push, pull or lift more than 10 pounds, and that he could not reach above the shoulder, twist, bend, stoop squat, kneel or climb.

In an October 18, 2016 note, Dr. Vizcay diagnosed cervical disc disease with stenosis and neuritis, bilateral upper extremity radiculopathy, bilateral shoulder tendinitis/bursitis, bilateral shoulder impingement, lumbar disc syndrome with myelopathy, bilateral lower extremity radiculopathy, bilateral hip bursitis, and depression secondary to chronic pain, anxiety, and work injuries. She noted that appellant continued to perform sedentary work, but recommended disability retirement. Dr. Vizcay repeated her prior diagnoses and conclusions in a February 28, 2017 note.

On August 10, 2017 appellant underwent a right shoulder MRI scan which demonstrated a partial tear of the supraspinatus tendon, biceps tendinosis, and hypertrophic changes at the acromioclavicular (AC) joint. He also underwent additional cervical and lumbar MRI scans which demonstrated straightened cervical lordosis, disc herniations at C3-4, C4-5, C5-6, C6-7, C7-T1, and T1-2 as well as L3-4, and L4-5, with disc bulges at L2-3, and L5-S1.

In an August 22, 2017 request for reconsideration, appellant, through counsel, contended that as he had claimed a recurrence of total disability within 90 days of returning to work, the focus of his claim should have been on establishing disability rather than causal relationship. He provided an affidavit noting that he returned to work on September 28, 2015 following his accepted employment injury, was taken off work for three weeks on December 4, 2015, and returned to work for four hours every other day on January 15, 2016.

By decision dated November 20, 2017, OWCP denied modification of the prior decision, finding that the medical evidence did not establish a change in the nature and extent of the accepted conditions.

On November 20, 2018 appellant, through counsel, requested reconsideration of the November 20, 2017 decision and contended that new medical evidence established worsening of appellant's accepted conditions based on electrodiagnostic studies.

On November 10, 2017 appellant underwent EMG/NCV studies which demonstrated chronic bilateral L2-4 radiculopathy and a new chronic right S1-2 radiculopathy.

In a November 22, 2017 report, Dr. Patel noted that appellant felt that his chronic neck and back pain had worsened and repeated his prior diagnoses. He reported that appellant's cranial nerves were within normal limits, that his motor strength was normal throughout both upper and lower extremities and that sensation was intact to light touch and pinprick. Dr. Patel again noted that appellant had 1+ reflexes in both upper and lower extremities. He reviewed appellant's August 10, 2017 cervical and lumbar MRI scans as well as his EMG/NCV studies. Dr. Patel noted that appellant's additional EMG/NCV studies on November 10, 2017 which demonstrated new conditions of chronic left C8-T1 radiculopathy, and acute right lower cervical radiculopathy changes as well as chronic right S1-2 radiculopathy, when compared to the July 2, 2016 studies.

By decision dated February 15, 2019, OWCP denied modification of its prior decisions.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition that had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. The term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁴

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the limited-duty requirements.⁵

An employee who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁶

ANALYSIS

The Board finds appellant has not met his burden of proof to establish a recurrence of total disability commencing June 6, 2016 causally related to his employment conditions.

OWCP accepted appellant's occupational disease claim for cervical disc displacement and dorsopathies C3-4, C4-5, and C5-6; impingement syndrome of the right shoulder, and lumbar intervertebral disc disorders with myelopathy at L3-4, L4-5, and L5-S1. On March 30, 2016 appellant accepted a light-duty position beginning April 14, 2016 working four hours a day, three days per week. He filed Form CA-7 claims for compensation alleging recurrence of total disability beginning June 6, 2016. Appellant has not alleged a change in the nature and extent of his light-duty job requirements. Additionally, there is no indication from the record that the employing establishment withdrew light-duty work. Instead, appellant attributed his inability to work to a change in the nature and extent of his accepted cervical, lumbar, and right shoulder conditions. He therefore, has the burden of proof to provide medical evidence to establish that he was disabled from work due to a worsening of his accepted work-related conditions.

⁴ 20 C.F.R. § 10.5(x); *K.A.*, Docket No. 19-0679 (issued April 6, 2020).

⁵ *R.N.*, Docket No. 19-1685 (issued February 26, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ *Id.*

In support of his claimed recurrence of total disability, appellant provided a June 6, 2016 form report from Dr. Haley, indicating that appellant was totally disabled due to lumbar and cervical stenosis. He also provided a series of reports including a June 6, 2016 note from Dr. Vizcay in which she opined that he was no longer capable of light-duty work due to daily exacerbation of the bilateral upper and lower extremity neuropathies as well as his required medications that caused sedation and decreased concentration. Neither Dr. Haley nor Dr. Vizcay explained how appellant had become totally disabled such that he could no longer perform his light-duty assignment for four hours a day, three days per week. A cursory opinion without explanation is of limited probative value.⁷ Without such an explanation, these reports are insufficient to establish a recurrence of total disability, as alleged.

In a report dated May 9, 2016, Dr. Patel, diagnosed cervical disc disease with neuritis and bilateral upper extremity radiculopathy since the work-related injury in 2009 with multilevel degenerative disc herniations on MRI scans. He also diagnosed lumbar disc syndrome with neuritis and bilateral lower extremity radiculopathy since 1992 aggravated from a work-related injury in 2009. Dr. Patel recommended that appellant retire as his condition was not going to improve and as his prescribed medications could cause drowsiness resulting in difficulty concentrating. However, he did not opine that appellant was totally disabled, and provided work restrictions. As Dr. Patel did not explain how appellant's conditions worsened such that he was unable to perform his modified-duty position, his report is of diminished probative value and is insufficient to establish appellant's claim.⁸

In his November 22, 2017 report, Dr. Patel noted that appellant's additional EMG/NCV studies on November 10, 2017 demonstrated new conditions of chronic left C8-T1 radiculopathy, and acute right lower cervical radiculopathy changes as well as chronic right S1-S1 radiculopathy, when compared to the July 2, 2016 studies. He did not offer an opinion as to whether these new conditions, diagnosed more than one year after appellant's alleged recurrence of total disability on June 6, 2016, were causally related to his accepted employment conditions or whether the additional conditions rendered appellant's totally disabled for work.⁹ Further, medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.¹⁰

Appellant also provided EMG/NCV studies. The Board has explained that diagnostic studies, standing alone, lack probative value as they do not address whether the accepted employment injury caused any of the diagnosed conditions.¹¹

⁷ *K.A.*, *supra* note 4; *L.B.*, Docket No. 07-1861 (issued December 13, 2007).

⁸ *S.D.*, Docket No. 19-0955 (issued February 3, 2020).

⁹ *See M.S.*, Docket No. 16-1907 (issued August 29, 2017).

¹⁰ *J.P.*, Docket No. 18-1396 (issued January 23, 2020); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹¹ *M.A.*, Docket No. 19-1551 (issued April 30, 2020).

As noted, appellant must submit rationalized medical evidence supporting causal relationship between the disabling conditions and the accepted injuries. Furthermore, the medical evidence must directly address the dates of disability for work for which compensation is claimed.¹² None of the medical evidence of record provided a discussion of how appellant's accepted conditions caused total disability during the period in question, or supported a finding that his newly diagnosed conditions were causally related to the accepted employment injury.¹³ Appellant therefore, has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing June 6, 2016 causally related to his employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the February 15, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹² *J.B.*, Docket No. 18-1751; 19-0793 (issued May 6, 2019); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹³ *Id.*